UTE INDIAN TRIBE
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December 1, 2015

Janet McCabe
Acting Assistant Administrator
Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Jane Nishida
Principal Deputy Assistant Administrator
Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

RE: Comments on FIP for Air Emissions from True Minor Sources for Oil and Gas Production in Indian Country - Docket ID No. EPA-HQ-OAR-2014-0606

Dear Administrators McCabe and Nishida:

The Ute Indian Tribe appreciates the opportunity to comment on the Environmental Protection Agency's (EPA) proposed rulemaking entitled *Review of New Sources and Modifications in Indian Country: Federal Implementation Plan for Managing Air Emissions from True Minor Sources Engaged in Oil and Natural Gas Production in Indian Country*. The Tribe has been an active participant in the development of the proposed rule working with both EPA as well as our oil and gas industry partners.

In addition to our comments on the proposed rule, the Tribe also incorporates and encloses its August 20, 2014 comments on EPA's advance notice of proposed rulemaking entitled *Managing Emissions from Oil and Natural Gas Production in Indian Country*, published in the Federal Register on June 5, 2014. 79 Fed. Reg. 32502. Many of these comments are still applicable to the proposed rule.

We look forward to continued government-to-government consultation with EPA on the proposed rule. Consultation should be scheduled once EPA has reviewed comments received on the proposed rule and is prepared to discuss those comments and any changes to the proposed rule with the Tribe and other interested tribes. Please contact the Tribe's Washington, D.C. Counsel, Rollie Wilson, at 202-340-8232 to schedule future consultations on this issue.

Thank you again for your efforts to work closely with the Tribe on this issue.

Sincerely,

Shaun Chapoose, Chairman
Ute Tribal Business Committee

Enclosures

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Comments on Review of New Sources and Modifications in Indian Country: Federal Implementation Plan for Managing Air Emissions from True Minor Sources Engaged in Oil and Natural Gas Production in Indian Country

Docket ID No. EPA-HQ-OAR-2014-0606

December 1, 2015

Introduction

The Ute Indian Tribe oversees air quality on our Uintah and Ouray Reservation while also maintaining its role as a major oil and gas producer. On our Reservation these goals are not in conflict with each other. Ultimately, the responsible and efficient regulation of air quality on our Reservation provides benefits for our member's health and while also ensuring development of our oil and gas resources to fund government operations, services we provide our members and the larger regional economy.

The Tribe agrees with the main theme of the Environmental Protection Agency's (EPA) proposed rulemaking entitled *Review of New Sources and Modifications in Indian Country: Federal Implementation Plan for Managing Air Emissions from True Minor Sources Engaged in Oil and Natural Gas Production in Indian Country* (FIP). The proposed rule or FIP is intended to protect the Reservation's air shed while allowing for streamlined permitting of minor oil and gas sources. However, we ask that the Environmental Protection Agency (EPA) achieve this goal in a manner that also promotes tribal sovereignty, authority, self-determination, and our ability to develop our resources to benefit our members.

Production of oil and gas began on our Reservation in the 1940's and has been ongoing for the past 70 years with significant periods of expansion. The Tribe leases about 400,000 acres for oil and gas development. We have about 7,000 wells that produce 45,000 barrels of oil a day. We also produce about 900 million cubic feet of gas per day. And, we have plans for expansion as the Tribe is in process of opening up an additional 150,000 acres to mineral leases on our Reservation.

The Tribe relies on its oil and gas development as the primary source of funding for our tribal government and the services we provide. We use these revenues to govern and provide services on the second largest reservation in the United States. Our Reservation covers more

than 4.5 million acres and we have about 3,000 members living on the Reservation. The Tribe is also a major employer and engine for economic growth in northeastern Utah.

Tribal businesses include a bowling alley, supermarket, gas stations, feedlot, an information technology company, manufacturing plant, and Ute Oil Field Water Services, LLC. Our governmental programs and tribal enterprises employ 450 people, 75% of whom are tribal members. Each year the Tribe generates tens of millions of dollars in economic activity in northeastern Utah.

The Tribe takes an active role in the development of its resources, however, despite our progress, the Tribe's ability to fully benefit from its resources is often limited by the federal agencies regulating oil and gas development on the Reservation. In order to avoid these limits the Tribe asks that EPA work hard to implement its proposed rule in a manner that recognizes that Indian lands are not public lands. This will require EPA's careful attention to developing its rule and implementing the rule in a manner that does not undermine our governmental authority and our ability to develop our resources to benefit our members.

Definition of Indian Country

The Tribe is very concerned about EPA's proposal to revise the definition of Indian Country for the purposes of this rule. The Tribe, like many tribes, is surrounded by state and county governments that seek to challenge our jurisdictional authority. EPA should be extremely careful that its efforts to regulate air quality in Indian Country do not result in court decisions that reduce tribal jurisdiction over portions of Indian Country. The Tribe recommends further consultation with tribes on this issue, as well as with the Department of Justice, well before EPA attempts to finalize this rule.

In short, before EPA made a distinction years ago between on-reservation and off-reservation Indian Country for the purposes of a tribe assuming Clean Air Act authority, EPA should have considered the implications of this distinction. From a tribal perspective there is no distinction. Tribal lands, allotments and dependent communities are all under tribal jurisdiction and authority. Tribes exercise jurisdiction over these lands through existing tribal sovereignty and in accordance with numerous Federal programs that affirm tribal authorities and tribal self-determination over these lands and areas.

To minimize any additional impacts from EPA's faulty distinction in the proposed rule, first, EPA should be cautious of how the rule appears. By restating the definition of Indian Country in the rule, it appears that EPA is defining the term. Of course, EPA cannot change the definition of Indian Country through the proposed rule. The term Indian Country was defined by Congress in statute at 25 U.S.C. § 1151. EPA's regulations cannot change or modify this definition. To avoid any confusion, EPA should revise the rule to make clear that Indian Country is statutorily defined.

The Tribe recommends that EPA delete from 40 C.F.R. § 49.167 its recitation of the definition of Indian Country. Rather than repeating 25 U.S.C. § 1151 in regulatory text, EPA should simply refer readers to the statute. In other words, EPA's regulatory text would read:

Indian Country is defined in 25 U.S.C. § 1151.

By simply referencing the statute, rather than appearing to change the definition of Indian Country, EPA will help to clarify the application of the proposed rule and its relationship to Indian Country which has meaning far beyond EPA's proposed rule.

In addition, the proposed and final rules should not state that EPA is "revising the definition of Indian Country." EPA is doing no such thing. As a result of *Oklahoma Dept. of Environmental Quality v. EPA*, 740 F.3d 185 (D.C. Cir. 2014), EPA is required to consider how it will apply the proposed rule in certain portions of Indian Country, but EPA is not revising the definition of Indian Country.

In other words, the Oklahoma case is not about the definition of Indian Country, but the process EPA is using to apply the proposed rule to certain parts of Indian Country. The Tribe recommends that EPA remove all references to revised definitions of Indian Country from the proposed rule. Rather than purporting to revise the definition of Indian Country, the Tribe suggests that EPA include a new section discussing the applicability of the proposed rule.

For this new section, the Tribe generally supports EPA's proposed language that the rule would apply to "all Indian reservation lands where no EPA-approved program is in place and all other areas of Indian country where no EPA-approved program is in place and over which an Indian tribe, or the EPA, has demonstrated that a tribe has jurisdiction." While this is a good start, EPA should make clear that a tribe's jurisdiction does not need to be "demonstrated" to exist. EPA should also be clear that the term jurisdiction is not just referring to Clean Air Act jurisdiction, but all forms of jurisdiction.

The Tribe also recommends that EPA address in the rule the underlying source of the problem—EPA procedures for recognizing tribal authority to implement the Clean Air Act. The distinction that EPA created in its regulations between on-reservation and off-reservation Indian Country was not included in the Clean Air Act and is not consistent with how tribes exercise authority over their lands. Most important, EPA should not require tribes to demonstrate authority over off-reservation areas. These areas were included in the definition of Indian Country for a reason—because tribes exercise authority over these areas.

Reservation-Specific FIP

The Tribe has serious concerns about the applicability of the FIP to nonattainment areas. In its current form, the FIP would not cover areas designed as nonattainment: "[The FIP] would not apply to new and modified true minor sources that are located or expanding in referenced areas of Indian country designated nonattainment." 80 Fed. Reg. at 56557. Given the very real likelihood of a nonattainment designation for the Uinta Basin in light of new ozone standards, the Tribe wants to see a rule that will facilitate a smooth transition for when EPA designates an area as nonattainment that was previously attainment or unclassified designation. What we cannot afford is a lengthy delay for attainment plans to be developed that would be just another reason for operators to focus their resources elsewhere.

While the Tribe appreciates the decision of the EPA to develop a FIP for minor sources, the Tribe maintains the position that EPA should develop a FIP specifically tailored to the unique air quality issues on the Uintah and Ouray Reservation. A nationwide FIP will not address the problems of a nonattainment designation, which will likely result in EPA attempting to process hundreds of true minor source permits within a relatively short timeline. If a reservation-specific FIP would lessen the inevitable administrative burden—both administratively and practically—that will result from a nonattainment designation, EPA should consider a final rule that provides for streamlined minor NSR in nonattainment areas so as not to disadvantage development on the Uintah and Ouray Reservation. Such a region-specific FIP would not only promote certainty in the Uinta Basin, but it would help transition operations under nonattainment requirements.

As expected, the proposed FIP does not cover areas that are currently or will in the near future have to transition from attainment to nonattainment, such as the Uinta Basin. Therefore, the FIP will likely have relatively limited efficacy on our Reservation. Given the amount of resources that have been devoted toward implementation of this rule, the Tribe would like to see a FIP that accommodates the Tribe's thoroughly documented concerns. Such a reservation-specific FIP would not only have many practical effects, it would also accommodate state requirements for minor source permitting. EPA recognized in the Fort Berthold FIP the importance of maintaining consistency with state requirements. Attempting to apply a "one-size-fits-all" approach at a national level would compromise unique concerns about the Uinta Basin's air quality. Just as EPA addressed the unique issues that arose for sources operating in the Bakken formation, EPA's Indian Country Minor New Source Review program must be based on a reservation or region-specific basis.

The Tribe cannot afford to lose the jobs or the revenue that funds essential government services if and when Utah develops its plan. A reservation-specific FIP would also have other benefits. Under the Clean Air Act, where a tribe has not developed an approved Tribal Implementation Plan ("TIP"), EPA has the authority to step into the shoes of the tribe pursuant to the FIP authority and implement a FIP in Indian Country. 76 Fed. Reg. 38748, 38752. EPA promulgated the "tribal authority rule" in 1998 to provide more detailed criteria and procedures for tribes to be treated as states under the CAA if they seek CAA program approval. 63 Fed. Reg. 7254 (Feb. 12, 1998). Tribes are authorized to develop a comprehensive TIP and seek full authority to monitor and enforce the National Ambient Air Quality Standards (NAAQS) within their reservation. The Ute Indian Tribe has an interest in at least exploring the possibility of working toward a TIP so that it may one day assume primacy over certain regulatory functions and expand its authority gradually.

Application of FIP to Minor Modifications at Major Sources and Synthetic Minor Sources.

Minor modifications should not be subject to source-specific permitting and more burdensome review than the same size new source or modifications at minor sources. The Tribe is concerned about the applicability of the FIP if the Uinta Basin is designated nonattainment. Although EPA has provided streamlined minor NSR in nonattainment areas for other source categories, it has excluded oil and gas sources in nonattainment areas from streamlined minor NSR. As a result, source-specific minor NSR will apply to all minor source emission increases

from oil and gas sources above 2 tons per year. Such a requirement will certainly limit oil and gas activity on the Reservation.

To both facilitate and encourage development on the Reservation, the FIP should be available for minor modifications at major sources and modifications at synthetic minor sources. Both of these modifications can be of the same size and type as modifications at a true minor source. Through the proposed rule, EPA limits the FIP to modifications at true minor sources. Requiring source-specific permitting for major sources and synthetic minors seems both inefficient and excessively burdensome.

The proposed FIP does not provide a streamlined approach for the Tribe's industry partners to obtain synthetic minor permits for oil and natural gas operations. By excluding synthetic minor sources from the FIP, operators must obtain synthetic minor permits through the complex and specific case-by-case permitting process established in §49.158. The absence of a streamlining mechanism would place oil and natural gas development on the Reservation at a distinct disadvantage when competing for development opportunities with adjacent state lands. To promote competition and reduce delays, EPA should consider including synthetic minor sources in its streamlining mechanism. Such an inclusion would both facilitate and streamline compliance with the minor NSR in Indian Country.

Government-to-Government Tribal Consultation

EPA should engage the Tribe in additional government-to-government consultation once EPA has reviewed comments on the proposed rule and is prepared to discuss those comments and any changes to the proposed rule. EPA's May 4, 2011, "Policy on Consultation and Coordination with Indian Tribes." provides in Section V.B.1. that "regulations or rules" and "permits" are "normally appropriate for consultation" among a number of other EPA activities. In addition, EPA's commitment to consult on regulations and rules fulfills Executive Order No. 13175 on "Consultation and Coordination with Indian Tribal Governments" which requires that, "Each agency shall … ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications."

Of course, this is also consistent with President Obama's direction in his November 5, 2009, Memorandum for the Heads of Executive Departments and Agencies on Tribal Consultation. In that Memorandum the President stated that, "My Administration is committed to regular and meaningful consultation and collaboration with tribal officials in policy decisions that have tribal implications including, as an initial step, through complete and consistent implementation of Executive Order 13175." The President also stated that, "Consultation is a critical ingredient of a sound and productive Federal-tribal relationship." We agree with the President. Federal rules are more effective when we work together.

Conclusion

The Tribe appreciates this opportunity to comment on EPA's proposed rule or FIP. Most important and before proceeding further, the Tribe asks that EPA, the Department of Justice and concerned tribes engage in consultation to address EPA's misguided attempt to revise the

definition of Indian Country. The issue EPA should be addressing is its regulatory process for affirming tribal authority to exercise jurisdiction under the Clean Air Act, not Congress' long-standing definition of Indian Country.

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August 20, 2014

Gina McCarthy, Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., NW
Washington, D.C. 20460

Re: Comments of the Ute Indian Tribe for the Federal Minor New Source Review Program in Indian Country, Docket ID No. EPA-HQ-OAR-2011-0151.

Dear Administrator McCarthy:

Please find enclosed the Ute Indian Tribe's comments to the U.S. Environmental Protection Agency ("EPA") in response to the Advance Notice of Proposed Rulemaking ("ANPR") entitled *Managing Emissions from Oil and Natural Gas Production in Indian Country*, published in the Federal Register on June 5, 2014. 79 Fed. Reg. 32502. Comments on the ANPR were originally due on July 21, 2014. In a Federal Register Notice on July 17, 2014, EPA extended the comment period to August 20, 2014. 79 Fed. Reg. 41665.

The Ute Indian Tribe recommends that EPA use a Federal Implementation Plan ("FIP") as the approach for its Indian Country Minor New Source Review program. First, EPA should consult with tribes to make sure that the rule addresses tribal concerns. For the Ute Indian Tribe, EPA should consult at least with the Ute Tribal Business Committee, the Energy and Minerals Department, and the Ute Air Quality Division to learn about oil and gas activities on our Reservation and the best way to regulate minor sources. A reservation-specific FIP would streamline the permitting approach while also addressing issues unique to the Uintah and Ouray Reservation. For this reason, the Tribe opposes a nationwide FIP, which would apply the same standards to all tribes and not account for the specific concerns of the Ute Indian Tribe.

Any final rule proposed by EPA must also account for the Tribe's dependence on the development of oil and gas on our Reservation. Energy development has long been an important part of the Tribe's Reservation and regional economy. The Tribe leases about 400,000 acres for oil and gas development, including about 7,000 wells that produce 45,000 barrels of oil a day. We also produce about 900 million cubic feet of gas per day. The Tribe relies on revenues from oil and gas development as the primary source of funding for governmental services provided by numerous tribal departments and agencies including natural resources, land, fish and wildlife management, housing, education, emergency medical services, public safety and energy and minerals management to name a few. In addition, revenues from oil and gas development

promote employment and economic growth in northeastern Utah including many tribally owned businesses. The Tribe fears that a nationwide approach would compromise the Tribe's interests.

In light of the enclosed comments, Tribe recommends that EPA use a FIP specific to the Uintah and Ouray Reservation to implement the Indian Country Minor New Source Review Program. The Tribe prefers a FIP over a permit-by-rule because the FIP can also regulate certain classes of existing minor sources. Whichever approach EPA chooses, however, must account for the unique characteristics of the Reservation and balance regulation with the Tribe's interest in developing its resources to provide for Tribal members so that it does not unnecessarily harm the Tribe's tremendous economic activities.

If you have any questions about these comments, please contact the Tribe's General Counsel, Tom Fredericks, at 303-673-9600. Thank you for your consideration.

Sincerely,

Gordon Howell, Chairman
Ute Tribal Business Committee

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Ute Indian Tribe of the Uintah and Ouray Reservation

Comments on the Advanced Notice of Proposed Rulemaking re: Indian Country Minor New Source Review Program

August 20, 2014

I. Introduction: Background on the Ute Indian Tribe

The Ute Indian Tribe of the Uintah and Ouray Indian Reservation (the "Tribe") appreciates the opportunity to provide the following comments to the U.S. Environmental Protection Agency ("EPA") in response to the Advance Notice of Proposed Rulemaking ("ANPR"). On June 5, 2014, the EPA issued the ANPR entitled *Managing Emissions from Oil and Natural Gas Production in Indian Country*. Below, the Tribe has included its feedback on what the Ute Indian Tribe believes is the most effective and efficient means of implementing an approach to address emissions from new and modified oil and natural gas production activities.

The Tribe is one of a handful of major oil and gas producing Indian tribes in the United States. Production of oil and gas began on the Uintah and Ouray Reservation (the "Reservation") in the 1940's and has continued with significant periods of expansion. The Tribe leases about 400,000 acres for oil and gas development and has about 7,000 wells that produce 45,000 barrels of oil per day. The Tribe also produces approximately 900 million cubic feet of gas per day. These amounts are likely to increase as the Tribe is opening up an additional 150,000 acres to mineral leases on the Reservation for exploration and development.

a. Economic Importance of Oil and Gas Development to the Tribe

The Tribe has a substantial interest in commenting on the ANPR because energy development spurs job creation and generates revenue that funds the tribal government and the services provided to tribal members on the second largest reservation in the United States. The tribal government manages the Reservation through 60 tribal departments and agencies including natural resources, land, fish and wildlife management, housing, education, emergency medical services, public safety, and energy and minerals management. The Tribe is also a major

employer and engine for economic growth in northeastern Utah. Governmental programs and tribal enterprises employ approximately 450 people, 75% of whom are tribal members. Each year the Tribe generates tens of millions of dollars in economic activity in northeastern Utah.

The Tribe serves as one of the most representative examples of how a tribe has been able to use energy production to lift itself out of poverty and improve the lives and well-being of its members through the revenues generated from its resources. The benefit of having significant natural resources enables the Tribe to supplement shortfalls in federal funding with revenues generated from oil and gas development to fund these vital tribal government programs. These benefits have helped the Tribe improve its governmental efficiency and effectiveness. Development also benefits the Tribe by stimulating economic development on the Reservation, creating both jobs and tribal businesses. Many of these jobs are in the oil and gas industry.

The Tribe takes an active role in the development of its resources as the owner of Ute Energy Exploration & Marketing LLC. The Tribe is a working interest owner in its oil and gas business as opposed to taking a passive role and only collecting royalties. Ute Energy Exploration & Marketing LLC jointly owns, with Anadarko Petroleum Corporation, the Chipeta gas processing and delivery plant in the Uintah Basin. Ute Energy Exploration & Marketing LLC also has ownership interests in other midstream assets in the Uintah Basin.

A uniform nationwide Indian Country Minor New Source Review Program that applies both to new and existing sources would further slow review and approval of oil and gas permits, impact the Tribe's ability to expand operations, and decrease the revenue the Tribe is able to earn from tribal lands. Despite the progress the Tribe has made, the ability to benefit from its resources is limited by multiple federal agencies overseeing oil and gas development on the Reservation. Delays in the federal oil and gas permit approval process are causing energy companies to limit their activities on the Reservation. Companies operating on the Reservation will only commit as many resources as can be supported by the pace of permit approvals.

The oil and gas companies operating on the Reservation often tell the Tribe that the federal oil and gas permitting process is the single biggest risk factor to their operations. If the risks become so great, drilling rigs will leave the Reservation for private or state lands. This would be even worse than companies limiting their operations because drilling rigs that leave the Reservation usually do not come back. The Tribe is concerned that if EPA used an approach that applied the same standards nationwide, rather than regulations designed specifically for the Uintah and Ouray Reservation, companies would limit their operations or leave the Reservation. This would lead to job cuts and significantly diminish revenue used to fund our tribal government and provide services to tribal members.

b. Air Quality Problems in the Uintah Basin

While oil and gas production is crucial to the Tribe's welfare, the Tribe is also committed to the sustainable and responsible development of its mineral resources. At this time, the Tribe is attempting to balance development with improving the Reservation's air quality, a difficult task as the Reservation sits within the Uintah Basin. Ozone levels in the Uintah Basin are among the worst in the nation. Winter ozone levels increase in the Basin when there is snow cover and a

strong temperature inversion that concentrates pollution emissions close to the ground. Under these conditions, volatile organic compounds (VOCs) and oxides of nitrogen (NOx) rapidly react to form ozone. Compounding the air quality problems, fugitive carbonyl emissions, especially formaldehyde, are released from oil and gas sources. This has also been shown to be an important contributor to ozone formation in the Basin. When these conditions occur, tribal members must endure poor air quality for weeks at a time.

The Tribe recommends a final rule that regulates emissions in a manner that still allows the Tribe to continue the development of its natural resources. Therefore, the Tribe recommends that EPA utilize a reservation-specific Federal Implementation Plan ("FIP") as an approach to address emissions from minor sources. While it may be difficult for EPA to develop a FIP for each Indian reservation, EPA should at least develop unique FIPs for major oil and gas producing tribes such as the Ute Indian Tribe. In doing so, EPA should balance the Tribe's need to continue economic development on the Reservation with improving air quality for the well-being of tribal members. The reservation-specific FIP would also take into account, though not imitate, the surrounding state's oil and gas regulations, making it less likely for operators to move operations to non-Indian and fee land. Such an approach would protect air quality while preserving essential revenue, jobs, and opportunities for economic development for Indian tribes.

II. The EPA Should Use a Reservation-Specific FIP to Streamline the Permitting on the Uintah and Ouray Reservation

The Ute Indian Tribe encourages EPA to use a FIP as an approach for its Indian Country Minor New Source Review program. A FIP would streamline the permitting approach, eliminate the need for unnecessary delays such as preconstruction approval, and apply requirements directly to sources subject to the regulation. But it is important that the FIP not apply the same standards to all of Indian Country, as the variations in state minor source permitting rules and concerns of Indian tribes cannot be adequately represented or addressed in a uniform national rule. Holding operators on the Reservation to standards EPA based off of California, for example, would unnecessarily obstruct development on the Uintah and Ouray Reservation. Therefore, EPA should develop reservation or region-specific FIPs that account for issues and concerns particular to that location. Through a reservation-by-reservation approach, EPA can protect tribal interests by regulating emissions in a fair yet effective manner.

a. The Tribe Opposes the Application of Nationwide FIP to the Reservation

The Tribe opposes any attempt to implement a nationwide FIP that does not take into account the unique characteristics of the Uintah and Ouray Reservation. After all, the goal is to develop a rule that would achieve somewhat equal standards between tribal land and federal, state, fee lands. The disparity in state regulation makes a nationwide FIP impractical to level the playing field between tribes located in different regions. A regional or reservation-specific FIP, however, could level the playing field by accounting for particular air quality concerns and permitting requirements of surrounding jurisdictions.

Consistency is a good thing. But an overly burdensome national FIP would lack both the flexibility and streamlining that is apparent in many state permitting programs. The national

applicability of the Tribal Minor NSR Review Program would not reflect the many variations in state minor source permitting. EPA recognized in the Fort Berthold FIP the importance of maintaining consistency with state minor source programs. Fed. Reg. 48878, 48881 ("Finally, this rule is important in that while not identical to, the rule is consistent with the regulations approved into North Dakota's SIP . . . this rule ensures that consistent requirements apply to activities both inside of and within the" Fort Berthold Indian Reservation). Attempting to apply a "one-size-fits-all" approach at a national level would certainly be at odds with state programs that are mature, and that may more readily accommodate unique air quality concerns and producing basin characteristics. Just as EPA addressed the unique issues that arose for sources operating in the Bakken formation, EPA's Indian Country Minor New Source Review program must be based on a reservation or region-specific basis.

b. EPA Should Develop a FIP for Major Oil and Gas Producing Tribes

EPA should develop a FIP specifically for the Uintah and Ouray Reservation. The Tribe's concerns are unique to the Uintah and Ouray Reservation and the Uintah Basin. Other tribes, in areas such as California, Washington, and Oregon do not share the same air quality concerns as the Ute Indian Tribe. Accordingly, it does not make sense for EPA to apply the same standards to all Indian tribes. Instead, EPA should address the individual concerns for each tribe's reservation or region. Such a localized FIP would account for, but not adopt, state rules and regulations to ensure that operators are not punished for on-reservation activities or rewarded for abandoning tribal operations in favor of fee or state land. To function as a solution rather than a barrier to development, the approach must take into account each reservation's unique characteristics. Although the Fort Berthold FIP is fundamentally different, EPA should use this FIP as a model.

A FIP developed solely for the Ute Indian Tribe is necessary to account for ozone problems unique to the Uintah Basin. Here, a nonattainment designation for ozone seems inevitable. Nonattainment areas have levels of pollutants that make air quality fall below national standards. 42 U.S.C. § 7407(d); *see also Great Basin Mine Watch v. EPA*, 401 F.3d 1094, 1096 (9th Cir. 2005) (describing the three classifications of air quality). Due to these deficiencies, the CAA requirements impose more stringent technology requirements on nonattainment areas in order to bring those areas within the national standards over time. 42 U.S.C. §§ 7501-7503. Both Uintah and Duchesne Counties are designated as "unclassifiable." 77 Fed. Reg. 30110, 30151 (May 21, 2012). Should EPA declare the Basin as nonattainment to reduce ozone pollution in the region, operators will be required to modify their technologies accordingly.

States usually take the lead in ensuring that regions or sources do not violate the NAAQS. *See North Carolina v. EPA*, 531 F.3d 896, 902 (D.C. Cir. 2008); *see also* 42 U.S.C. § 7410. If EPA designates an area as nonattainment, then the state must develop a plan to bring the area back into attainment within a limited period of time. The applicable regulations impose strict emissions controls and other measures on sources operating or proposing to operate in nonattainment areas. *See generally*, 42 U.S.C. §§ 7502, 7503; 40 C.F.R. §§ 51.165–.166. Fully aware of the strict emissions controls, the Tribe has been working with its oil and gas industry partners to identify emission reduction strategies that could improve public health and could also

reduce future regulatory requirements that would occur if the area is designated as nonattainment.

However, episodic and voluntary seasonal controls are not enough to effectively reduce emissions in the area. The Tribe would like to see oil and gas operators take steps now, rather than after the nonattainment designation, to address emissions that cause or contribute to a NAAQS or PSD increment violation. Because oil and gas development is so essential to the Tribe, it is important to preserve the Tribe's ability to continue development. The Tribe cannot afford to lose the jobs or the revenue that funds essential government services. Further, steps to improve air quality should not be delayed until EPA designates the Basin as nonattainment for ozone. Delayed action compromises the health and safety of tribal members and non-Indians throughout the Basin. Here, the Tribe would like to see EPA establish air quality controls to address the air quality concerns in a matter that is neither excessively expensive nor unnecessary. *See, e.g.*, *Sierra Club v. U.S. EPA*, 99 F.3d 1551, 1556 (10th Cir. 1996). For this reason, a reservation-specific FIP is preferred.

A reservation-specific FIP would also have other benefits. Under the Clean Air Act, where a tribe has not developed an approved Tribal Implementation Plan ("TIP"), EPA has the authority to step into the shoes of the tribe pursuant to the FIP authority and implement a FIP in Indian Country. 76 Fed. Reg. 38748, 38752. EPA promulgated the "tribal authority rule" in 1998 to provide more detailed criteria and procedures for tribes to be treated as states under the CAA if they seek CAA program approval. 63 Fed. Reg. 7254 (Feb. 12, 1998). Tribes are authorized to develop a comprehensive TIP and seek full authority to monitor and enforce the National Ambient Air Quality Standards (NAAQS) within their reservation. The Ute Indian Tribe has an interest in at least exploring the possibility of working toward a TIP so that it may one day assume primacy over certain regulatory functions and expand its authority gradually.

c. EPA Could Use a Reservation-Specific FIP to Regulate Emissions from Existing Minor Sources

The Ute Indian Tribe is also concerned about the cumulative air quality impact from existing minor source emissions. Hundreds of unregulated existing minor sources on the Uintah and Ouray Reservation harm the health and welfare of tribal members. Neither a general permit nor a permit-by-rule would allow EPA to regulate these emissions. A FIP could regulate existing sources. However, not all existing minor sources should be regulated in the same manner and EPA should target those sources most directly contributing to air quality degradation. If EPA chooses to regulate existing sources in a FIP developed specifically for the Uintah and Ouray Reservation, it should apply control requirements to existing source emissions in a flexible manner, gradually increasing enforcement as appropriate.

The Tribe would like to see the rule apply to the oldest and most inefficient minor sources. Prioritizing existing minor sources could provide a solution that is not overly burdensome to oil and gas operators on the Reservation. Without first meeting with the Tribe's Air Quality Division to determine which sources should be included, a FIP that includes all existing sources would compromise continued development on the Reservation, limiting both tribal revenue and opportunities for tribal members. Oil and gas operations have created

enormous opportunities for the Tribe and its members. It is crucial that a reservation-specific FIP not unfairly hamper these opportunities.

d. EPA Should First Consult with the Ute Indian Tribe

To develop an effective and equitable FIP, EPA should first consult with the Ute Indian Tribe so that the Tribe can offer its expertise, experience, and input into developing the FIP. Executive Order No. 13175 on Consultation and Coordination with Indian Tribal Governments requires that tribal consultation start at the earliest possible point in the process. Consultation must begin early so that tribes can be involved in designing the proposed rules from the ground up. Section 3(c)(3) of the Executive Order No. 13175 directs that EPA, "consult with tribal officials as to the need for Federal standards and any alternatives that would limit the scope of Federal standards or otherwise preserve the prerogatives and authority of Indian tribes." Consultation after a proposed rule has already been published in the Federal Register does not provide tribes with this opportunity.

Tribal consultation allows EPA to integrate the Tribe's comments and concerns so that the Uintah and Ouray Reservation FIP functions in the best interest of the Tribe. Unlike EPA, the Tribe is intimately familiar with the Reservation, member concerns, economic development, and the effects of air quality problems on tribal members. EPA should at least consult with the Ute Tribal Business Committee, the Energy and Minerals Department, and the Ute Air Quality Division to learn more about oil and gas activities on our Reservation and the best way to regulate minor sources so that it will not interrupt economic development. This would ensure that EPA truly regulates in the shoes of the Tribe. *See Oklahoma DEQ v. EPA*, 740 F.3d 185, 194–95 (D.C. Cir. 2014). Only after proper consultation will EPA have an understanding of the potential impacts—both regulatory and economic—of any regulation.

III. EPA Should Not Use a General Permit as an Approach to Regulate New Minor Sources

The EPA should not use a general permit because such an approach would cause unnecessary delays such as pre-construction review. This would create a significant administrative burden for EPA regional offices and has the potential to create new permitting backlogs, slowing production, delaying jobs, and diminishing tribal revenue. It undermines the Tribe's goal to streamline this process and introduces a new element of uncertainty into company drilling schedules. The limited staffing resources available at the Division of Air Quality would create additional permitting delays, with commensurate financial risk for companies contemplating investment on the Reservation. A general permit will create other delays by enabling the public to challenge a particular source receiving coverage at the administrative level. Enabling public participation at this level would allow individuals who live hundreds or thousands of miles away, and without any affiliation to the Tribe, to prevent the Tribe from realizing the benefits of its trust resources. For these reasons, the Tribe opposes a general permit as a means to address existing sources in Indian Country.

IV. A FIP is Preferred to a Permit-by-Rule

The Tribe opposes a final rule that utilizes a permit-by-rule approach. Such an approach would be limited to addressing emissions from new and modified sources. A permit-by-rule provides many advantages over a general permit. For example, a permit-by-rule produces a standard set of requirements that may apply to multiple sources with similar emissions and other characteristics. This streamlined approach enables operators to notify the EPA that an individual source meets all eligibility criteria for coverage. Other benefits are that preconstruction approval is not required and the public may only object to a particular source receiving permit coverage though judicial challenge. A permit-by-rule would be far less resource-intensive than general permits. Nevertheless, the Tribe recommends that EPA consult with tribes to develop a reservation-specific FIP, which is preferable to a permit-by-rule.

V. The EPA Should Not Include Setback Requirements in the Final Rule

The final rule should not implement a setback requirement. This rule should address air emissions, not the location of the sources creating those emissions in relation to structures in Indian country. Including a setback requirement undermines tribal sovereignty, contravenes explicit requirements embodied in existing Indian mineral leases, and is contrary to existing BIA regulations. Moreover, EPA cannot exceed the authority granted by Congress. *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). Congress has not granted authority to EPA to supplant tribal surface jurisdiction. Further, specific setback requirements are already embodied in Indian mineral leases and the regulations implementing and governing the same. Finally, many oil and gas producing tribes already have ordinances or regulations that establish setbacks. EPA does not have surface authority as a setback requirement has nothing to do with the air.

The federal government should protect trust resources by refusing to implement unnecessary regulatory barriers and complications that compromise the value of Indian minerals that fund essential government services. Including setback requirements in this rule would be such an example of unnecessary regulations. The federal government should not regulate where the tribes already do. While some tribes have passed zoning laws for oil and gas facilities, others include setback provisions in Exploration and Development Agreements or oil and gas leases. Further, EPA should support tribes that exercise their sovereignty. Tribes can determine the appropriate setback distance. Applying state setback requirements to Indian land would undercut tribal negotiations, tribal ordinances, and tribal regulations. Such action would conflict with well-established federal case law and place Indian lessors under the jurisdiction of state requirements that are wholly inapplicable to Indian trust minerals. The Ute Indian Tribe opposes any attempt to apply state law to the Uintah and Ouray Reservation.

It is the duty of tribes to protect the property and wellbeing of lands subject to tribal jurisdiction by establishing setback requirements applicable to such lands. Individual tribal energy offices have the expertise to determine proper distances and when a variance should be granted. Establishing a distance from certain types of structures is a matter of tribal, not federal, concern. Additionally, EPA should not compromise the ability of tribes to include other provisions in setback requirements, limiting operations to more than just a house, structure, or reservoir of water without the surface owner's prior written consent. The federal government implicitly acknowledged this in the Fort Berthold FIP, which does not contain a setback requirement. The EPA must defer to tribes on setback requirements.

Finally, federal regulations already include setback requirements. Indian mineral leases authorized by the IMLA and the 1909 Act contain a provision prohibiting the lessee from drilling within a certain distance of any house or barn on the premises without the lessor's written consent approved by the Secretary. *See* 25 C.F.R. §§ 211.47(f); 212.47(f). This distance is typically two hundred feet. These agreements between Indian mineral owners and mineral lessees, which the Secretary approves, include a bargained for setback requirement.

VI. EPA Should Not Use State Law as a Basis for the Final Rule

EPA requests comments on whether state requirements should be the basis for requirements in surrounding areas under Federal jurisdiction should be used. The Tribe does not believe that it is appropriate to apply state regulations to Indian Country. Just as it would be inappropriate to apply Utah or California state law to the Uintah and Ouray Reservation, it would be inappropriate to apply one state's law to all of Indian Country. For example, applying robust yet costly and burdensome regulations to Indian Country, like those that exist in the State of California, would disadvantage Indian tribes in states more conducive to oil and gas development. By developing reservation or region-specific FIPs, EPA would promote development while also applying, if necessary, an added layer of environmental protection that specifically addresses the Tribe's concerns and the unique characteristics of the region or reservation.

VII. Conclusion

The Tribe appreciates the opportunity to present its comments and concerns regarding the ANPR. The Tribe recommends that EPA use an approach that allows for EPA to develop a FIP specific to the Uintah and Ouray Reservation to implement the Indian Country Minor New Source Review Program. The Tribe prefers a FIP over a permit-by-rule because the FIP can also regulate certain classes of existing sources. EPA should develop a FIP specifically for the Uintah and Ouray Reservation so that it accounts for the unique characteristics of the Reservation and balances regulation of emissions with the Tribe's interest in developing its resources to provide for Tribal members.